UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT M. REVELES,

Defendant.

CASE NO. CR09-5883JRC

ORDER DENYING DEFENDANT'S MOTION TO DISMISS FOR ALLEGED VIOLATION OF THE DOUBLE JEOPARDY CLAUSE

THIS MATTER comes before the Court on Defendant's motion to dismiss the Information for alleged violation of the double jeopardy clause (Dkt. 11). The Court has considered the following:

1. Defendant's Motion to Dismiss Information for Violation of the Double Jeopardy Clause, with attachments (Dkt. 11);

2. Government's Answer to Defendant's Motion to Dismiss Information for Violation of the Double Jeopardy Clause, with attachments (Dkt. 12);

3. Defendant's Reply to Motion to Dismiss Information for Violation of the Double Jeopardy Clause (Dkt. 14); and

4. Defendant's Supplemental Authority in Support of Defendant's Motion to Dismiss (Dkt. 15).

After having reviewed the submissions and considered the authorities cited therein, this Court concludes that Defendant's motion to dismiss should be denied. While Defendant's alleged drunken or reckless driving of a vehicle on a naval base resulted in non-judicial punishment by his commanding officer, this punishment, while perhaps severe, is not so punitive in nature as to transform a *military* punishment into a *criminal* punishment, nor subject the defendant to double jeopardy under the 5th Amendment.

FACTUAL SUMMARY

The parties submitted stipulated facts surrounding the circumstances of this incident, the resulting criminal charges, and defendant's military punishment. Dkt. 18. Mr. Reveles is accused of driving while drunk on October 2, 2009 on Naval Base Kitsap in Bremerton, Washington. He is charged with violation of 18 U.S.C. §§ 7 and 13 and RCW §46.61.502. Dkt. 1. He was also charged by the Navy in an Article 15 proceeding with 'violation of the Uniform Code of Military Justice, Article 111, drunken or reckless operation of a motor vehicle." Dkt 18. This is considered Non-Judicial Punishment ("NJP") and does not involve a court-martial. Both charges arise out of the same incident. *Id.* Defendant appeared at an Article 15 proceeding on October 5, 2009 and his commanding officer imposed the following non-judicial punishment:

1. Restriction to ship for 45 days;
2. Forfeiture of $200 pay for one month;
3. Reduction to next inferior pay grade; and
4. Extra duty for 45 days.

His 45-day restriction to ship included the following rules:

1. No civilian clothing;
2. No phone privileges;
3. No music of any kind, including ipods or radios;
4. No outside food or drink;
5. No television;
6. Muster 5 times per day; and
7. Extra military instruction and duties consisting of cleaning heads, hallways, and offices, along with taking out trash and doing general cleaning.

Dkt. 18-2.

As noted by counsel for Defendant at oral argument, the court recognizes that many of these punishments are more severe than what is imposed on inmates in federal detention. Defendant has filed a timely motion to dismiss on the grounds that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amendment V.

LEGAL STANDARD Although it appears that the Ninth Circuit has not previously addressed this issue directly, several cases throughout the country have considered similar issues and reached inapposite conclusions. *Compare* United States v. Trogden, 476 F. Supp. 564 (E.D. Va. 2007) *and* United States v. Gammons, 51 M.J. 169 (Ct. App. Armed Forces 1999) *with* United states v. Volpe, 986 F. Supp 122 (N.D.N.Y. 1997). Both parties agree that the Supreme Court in the case of Hudson v. United State, 522 U.S. 93 (1997) set for the applicable standard. It noted that the Court has"long recognized that the Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that could 'in common parlance,' be described as punishment." *Id.* at 98-99 (*quoting* United States ex rel Marcus v. Hess, 317 U.S. 537 (1943).

Instead, "[t]he Clause protects only against the imposition of multiple *criminal* punishments for the same offense." *Id*.at 99.

Hudson requires a two-part analysis. A court must first consider whether a particular punishment is criminal or civil in nature. This is a matter of statutory construction. *Id.* The court considers whether the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *Id.* (*citing* United States v. Ward, 448 U.S. 242, 248 (1980). In this instance, Congress' purpose in enacting NJP was clearly not to impose a criminal penalty. The Senate Armed Services Committee commenting on amendments to Article 15 in 1962 stated: "Since the punishment is nonjudicial, it is not considered as a conviction of a crime and in this sense has no connection with the military court-martial system." S. Rep. No. 1911, 87th Cong., 2d Sess. (1962) *reprinted* in 1962 U.S.Code Congressional and Administrative News at 2380. As noted by the Armed Forces Court of Appeals examining a similar case, ". . . the title of the legislation – 'Commanding officer's non-judicial punishment' – underscores the legislative intent to separate NJP from the judicial procedures of the military's criminal law forum, the court-martial." United States v. Gammons, 51 M.J. 169, 177 (Ct. App. Armed Forces 1999). Additionally, Article 15 provides that "any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one or more of the following *disciplinary* punishments for minor offenses without the intervention of a court-martial." 10 U.S.C. § 815(b)(emphasis added). As has been noted by other courts, this indicates a congressional intention to treat NJP a disciplinary in nature, and not criminal. See United States v. Trogden, 476 F. Supp. 2d 564, 568 (E.D. Va. 2007); Gammons, *supra*, at 177. This congressional intent is "entitled to considerable deference." SEC v. Palmisano, 135 F.3d

860, 864 (2nd Cir. 1998). Therefore, this court concludes that Congress did not intend disciplinary measures imposed through NJP to be considered criminal in nature.

The second part of the Hudson test is "whether the statutory scheme was so punitive either in purpose or effect . . .as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty. . .." Hudson, at 99. The Court recognized seven "guideposts" when evaluating the punishment – none of which were intended to be dispositive. The court should consider :

1. Whether the sanction involves an affirmative disability or a restraint;
2. Whether it has historically been regarded as a punishment;
3. Whether it comes into play only on a finding of *scienter*;
4. Whether its operation will promote the traditional aims of punishment – retribution and deterrents;
5. Whether the behavior to which it applies is already a crime;
6. Whether an alternative purpose to which it may rationally be connected is assignable for it; and
7. Whether it appears excessive in relation to the alternative proposed purpose assigned.

Id. at 99-100.

FINDINGS

In analyzing each of these guideposts, the court must evaluate the disciplinary aspect of each punishment meted out by the commanding officer. The rigors of military discipline, even for those service-members who have committed no infraction, can be extreme and sometimes harsh. Defendant's commanding officer may order him to be deployed involuntarily to a distant location, to be separated from family and friends and required to live in extremely confined quarters on board a ship, and even to be ordered to perform duties that may lead to the ultimate

sacrifice – all within the purview of a commanding officer's authority. Therefore, when evaluating the punitive nature of the discipline in this case, the court must consider the broad authority of the commanding officer to enforce discipline. Only the "clearest proof" will transform what has been denominated a civil remedy into a criminal penalty. Hudson, 522 U.S. at 100.

1. Whether the sanction involves an affirmative disability or a restraint. Here, the court considers whether the sanction involves the "infamous punishment of imprisonment." Hudson , 522 U.S. at 104. While confined to ship, the defendant was not subject to imprisonment in the brig, which is the traditional form of military imprisonment.

2. Whether it has historically been regarded as a punishment. While NJP has been considered a "punishment," it is not historically regarded as a "*criminal* punishment." United States v. Trogden, 476 F. Supp. 2d at 570, *citing* United States v. Burns, 29 F. Supp. 2d 318, 322 (E.D. Va. 1998). "NJP provides military commanders with 'an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in service members without the stigma of a courtmartial conviction." Manual for Courts-Martial, United States, Part V, para 1c. Therefore, historically, NJP is considered as a disciplinary measure and not a criminal punishment.

3. Whether it comes into play only on a finding of scienter. It is clear in this case that NJP may impose this disciplinary punishment regardless of the intent of the defendant. An inquiry into the violator's state of mind is not a factor in determining military discipline of this sort.

4. Whether its operation will promote the traditional aims of punishment. While NJP invokes the traditional aims of punishment-retribution and deterrence, this does not mean

that the punishment is criminal in nature. As the Supreme Court has stated, "All civil penalties have some deterrence affect." Hudson, at 102. This, by itself, does not render a sanction as criminal, even though it is intended to deter. Certainly the Government has a significant interest in maintaining discipline in its military. Therefore, although the sanctions have a deterrence effect, this does not transform a sanction into a criminal penalty.

5. Whether the behavior to which it applies is already a crime. Certainly, Defendant faces criminal charges for this activity. Nevertheless, civil penalties in addition to criminal charges do not make the criminal charges double jeopardy. *See* United States v. Dixon, 509 U.S. 688, 704 (1993).

6. Whether an alternative purpose to which it may rationally be connected is assignable for it. As noted above, military discipline has the alternative purpose of maintaining order in the military, which is fundamentally different from criminal punishment. "Discipline, which entails the control of armed forces through prompt obedience of superior order is an integral component of successful military observations. United States v. Gammons, 51 M.J. at 178.

7. Whether it appears excessive in relation to the alternative proposed purpose assigned. The military discipline imposed upon the Defendant is certainly severe, but it does not appear to be excessive in relation to the goals it is attempting to achieve. It is not for this Court to second guess a commanding officer's order. Therefore, the orders imposed by this commanding officer, albeit severe, do not give rise to criminal penalties.

In summary, this court concludes that there is no indication that Congress ever intended for NJP to be criminal, in nature. In fact, to the contrary, it appears that Congress intended NJP

to serve as an alternative to court-martial. Nor is NJP, at least as applied in this case, so onerous as to transform what was intended to be a civil remedy into a criminal penalty.

ORDER

Based on the foregoing, , the criminal charges before the court do not violate the Fifth Amendment Double Jeopardy Clause. Defendant's motion to dismiss (Dkt. 11) is denied.

DATED this 27th day of April, 2010.

J. Richard Creatura
United States Magistrate Judge